

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER 97-0359
RESPONSIBLE OFFICER
SALES TAX and WITHHOLDING TAX
For Tax Periods: 1994-1996

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Issues

Sales and Withholding Tax -Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8 (f), IC 6-8.1-5-1 (b), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995).

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The taxpayer protests the assessment of responsible officer liability for unpaid sales and withholding taxes.

Statement of Facts

The taxpayer was secretary of a corporation which did not remit the proper amount of sales withholding taxes to Indiana. The taxpayer was personally assessed for the taxes and protested these assessments. More facts will be provided as necessary.

Sales and Withholding Tax -Responsible Officer Liability

Discussion

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 which provides as follows:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The proposed withholding taxes were assessed against Taxpayer pursuant to IC 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the Taxpayer who has the burden of proving that assessment is incorrect. IC 6-8.1-5-1 (b).

The issue to be determined in this case is whether the taxpayer had the statutory duty to remit the sales and withholding trust taxes to Indiana.

Pursuant to Indiana Department of Revenue v. Safayan, 654 N.E. 2nd 270 (Ind.1995) at page 273: "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid." In the Safayan case, the Court determined that Mrs. Safayan was a responsible officer with the duty to remit trust taxes to the state.

The Court enumerated several factors that are relevant in determining who has the duty to see that trust taxes are remitted to the state. First, the Court considered the person's position within the power structure of the organization. Mrs. Safayan was the president of the corporation. This taxpayer was the secretary of the corporation. The Court also considered the actual authority of the officer. As president, Mrs. Safayan had broad ranging authority concerning the daily operation of the corporation and the corporate finances. This taxpayer's duties merely included taking minutes at Board and shareholder meetings. She had no authority to hire or fire employees, manage employees, deal with major suppliers and customers, negotiate material corporate contracts, prepare federal or state tax returns, review federal or state income tax returns or determine the corporation's financial policy. Additionally, she never owned an interest in or served as a director of the corporation. Finally the Court considered the Articles of Incorporation and the Bylaws of the corporation. In the Safayan case the Articles of Incorporation and Bylaws were not a factor because they simply outlined the general

powers of a president. In this case, the Articles of Incorporation and Bylaws are no longer available.

The taxpayer also presented evidence that the Internal Revenue Service investigated her concerning possible responsibility for remittance of federal withholding taxes. The taxpayer was not considered a responsible officer for federal purposes. Although Internal Revenue Service decisions are not binding on the Indiana Department of Revenue, the decision is evidence to be considered in making a determination as to whether a particular person is responsible for the payment of Indiana trust taxes.

The taxpayer sustained her burden of proving that she was not an officer responsible for the remittance of trust taxes to Indiana.

Finding

Taxpayer's protest is sustained.